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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 17 1997

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Implementation of the Non-Accounting) CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the)
Communications Act of 1934, as amended)

COMMENTS OF TELEPORT COMMUNICATIONS GROUP INC.

Teleport Communications Group Inc. ("TCG") hereby responds to the Commission's request for comments regarding the scope of section 272(e)(4) of the Communications Act.^{1/} Bell Atlantic and Pacific Telesis filed a Motion for Summary Reversal or for Expedition of certain findings made in the First Report and Order issued in the above captioned proceeding.^{2/} The Commission's request for comments follows the remand of the Motion by the United States Court of Appeals for the District of Columbia Circuit to the Commission. For ease of review, TCG has repeated the Commission's questions herein and TCG's response follows accordingly. All footnotes from the original questions have been omitted.

^{1/} "Comments Requested in Connection with Expedited Reconsideration of Interpretation of Section 272(a)(4)," Public Notice, CC Docket No. 96-149, DA 97-666 (rel. April 3, 1997).

^{2/} Bell Atlantic Telephone Companies, Bell Atlantic Communications, Inc., and Pacific Telesis Group v. FCC, No. 97-1067 (D.C. Cir. February 11, 1997).

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1. Section 272(a) states, among other things, that BOCs "may not provide" directly "[o]riginat[i]on of [in-region] interLATA telecommunications services." Before the court, the BOCs argued that their reading of section 272(e)(4) does not conflict with section 272(a) because when a BOC provides in-region interLATA telecommunications services on a wholesale basis, it does not "[o]riginat[e]" such services. We seek comment on what precisely it means to "originate" an interLATA telecommunications service. Is "origination" strictly a retail concept? Commenting parties should also discuss the legal implications, if any, of the fact that section 271(b)(1), which prohibits a BOC or its affiliate from providing "interLATA services originating in any of its in-region States" prior to FCC approval, also uses a form of the term "originate."

The restrictions in sections 271 and 272 on the provision of telecommunications services by the BOCs do not distinguish between wholesale and retail interLATA services. Pursuant to sections 271 and 272 of the Communications Act, Congress provided that a BOC may not provide in-region interLATA services unless it has received authority under section 271 to do so. Such authority entails a showing by the BOC of facilities-based local exchange competition and compliance with the 14-point competitive checklist, and that its entry into the long distance market is in the public interest.^{3/} In addition, under section 272(a), once section 271 authority has been granted, the BOC is required to provide specified services through a separate affiliate, including "[o]riginat[i]on of interLATA telecommunications services." This restriction applies to the provision of either retail or wholesale in-region interLATA services and clearly prohibits the BOC from providing such services directly for the three year period.

"Origination" in this context applies to the provision of any interLATA telecommunications services and cannot be construed to mean that Congress was

^{3/} See 47 U.S.C. §§ 271(c) and (d).

only referring to retail services. It would be an anomalous result for Congress to have specifically set forth those services for which the 271 and 272 restrictions did not apply — for example, out-of-region interLATA service, electronic publishing, or alarm monitoring — but then also intend that the same restrictions not apply to wholesale services, simply based on the use of the language "origination of interLATA telecommunications services" to refer only to retail services.

Accordingly, TCG agrees with the Commission's finding that Congress did not distinguish between retail and wholesale interLATA services in imposing restrictions upon BOCs in sections 271 and 272.^{4/} Congress made such distinctions where applicable. For example, in section 251, Congress requires incumbent local exchange carriers to make its retail services available at wholesale rates, for resale by competing carriers.^{5/} Clearly, Congress employed the wholesale and retail terminology when that is what it intended. Therefore, the use of the term "origination" in section 272(a)(2)(B) does not suggest that the restrictions of sections 271 and 272 should be applied differently to retail and wholesale in-region interLATA service. No such distinction should be inferred if not explicitly stated.

^{4/} First Report and Order at ¶¶ 264-65.

^{5/} 47 U.S.C. § 251(c)(4)(A).

2. What is the legal significance, if any, of the fact that section 272(e)(4) applies to *intra*LATA services and facilities as well as interLATA services and facilities? Before the court, for example, AT&T argued that the use of the term "intraLATA" demonstrates that section 272(e)(4) is not a grant of authority because, among other things, "a BOC needs no grant of statutory authority to provide intraLATA services."

Nothing in section 272(e)(4) should be construed to relieve a BOC of the requirement that it be granted section 271 authority before it may provide interLATA service to its affiliate and before the affiliate is permitted to provide in-region interLATA service. Clearly, section 272(e)(4) itself is not a grant of authority. However, the inclusion of "intraLATA services and facilities" in this provision does not mean that the BOC's 272 affiliate can provide intraLATA service while also providing in-region interLATA service. As TCG has explained throughout this proceeding, permitting the 272 affiliate to provide both interLATA and intraLATA services once section 271 authority has been granted impermissibly permits the BOC to circumvent the separate affiliate requirement.^{9/}

Permitting the section 272 affiliate to provide both in-region interLATA service and intraLATA service turns the Act on its head by allowing the BOCs to evade the mandate that they must keep separate their interLATA and local exchange operations. Indeed, such an outcome has the result of reinstituting the same structure that Congress had specifically prohibited by section 272(a). Pursuant to this section, in-region, interLATA service can only be provided through a separate affiliate for a period of three years once section 271 approval is

^{9/} See TCG Petition for Reconsideration, CC Docket 96-149 (filed February 20, 1997).

obtained. This separation is intended to prevent cross-subsidization between the BOCs' local and interLATA services, which would threaten the vitality of local exchange service competition, and to prevent the exercise by the affiliate of market dominance through its provision of in-region, interLATA service and local service. It is clear that the BOCs could engage in a variety of practices that would thwart the purpose of the separate subsidiary requirement if this strict distinction between the provision of interLATA and intraLATA services is not maintained.

For example, the BOCs could transfer bottleneck facilities to the section 272 affiliate or another affiliate, such that violations by affiliates or "assigns" of the non-accounting safeguards provisions may be difficult to detect. The BOCs can use layers of unregulated affiliates that do not provide services to end users to provide services to the section 272 affiliate, thereby discriminating in their favor as compared to the rates, terms, and conditions that may be offered by the BOC to other competitors. Therefore, inclusion of "intraLATA services and facilities" in section 272(e)(4) cannot be read to relieve a BOC of its obligation to obtain section 271 authority before providing in-region interLATA service through an affiliate, or to allow the affiliate to provide both in-region interLATA service and intraLATA service.

3. Are the principal concerns that underlie the separate affiliate requirement of section 272 -- discrimination and cost misallocation by a BOC -- less serious in the context of the wholesale provisioning of in-region interLATA services to affiliates than in the context of the direct retail provisioning of such services, at least where, as here, any such provisioning is required to take place in a non-discriminatory manner? If they are less serious, are they nonetheless serious enough to justify, as a policy matter, prohibiting such wholesale provisioning? Of what relevance, if any, is the fact that there was no exception to

the interLATA services restriction contained in the Modified Final Judgement for wholesale interLATA services provided on a non-discriminatory basis, or that there presently is no wholesale interLATA services exception to section 272's prohibition on the provision of in-region interLATA services prior to FCC approval? At the same time, of what relevance, if any, is the fact that once a BOC has received section 271 approval and its interLATA affiliate is permitted to provide in-region interLATA services, the 1996 Act also allows the BOC to provide its interLATA affiliate various wholesale services and facilities, such as wholesale access services and wholesale access to unbundled network elements, so long as the BOC does so in a non-discriminatory way and in arm's length transactions? What is the policy justification for not permitting the BOC to provide, in addition, wholesale interLATA services to its affiliate?

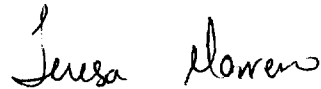
4. Does the extent of concern for discrimination and cost misallocation depend, at least in part, on the particular kind of in-region wholesale interLATA service a BOC seeks to offer? For example, does the extent of concern differ depending on whether the wholesale service being offered is a bundled end-to-end interLATA service or an interLATA service that merely transmits traffic from a point of presence in one LATA to a point of presence in another LATA? How would the non-discrimination requirements in section 272(e)(4) apply to these different kinds of wholesale interLATA services? Are there some kinds of services that, in practice, could not be provided in a non-discriminatory manner?

In response to questions 3 and 4, concerns about discrimination and cost misallocation that arise in the context of a BOC providing service to itself apply whether the service is being offered on a retail or wholesale basis. For this reason, section 272(e)(4) does not relieve the BOC of its 271 obligations with respect to any type of in-region interLATA service. It is only through the separate affiliate requirements and additional accounting and non-accounting safeguards (including reporting requirements) that competitors and the Commission can best ensure that the BOCs are not engaging in discrimination and cost misallocation in the provisioning of services to itself and its affiliates compared to provision of the same services to competitors. The fact that Congress nowhere distinguishes

between retail and wholesale services in sections 271 and 272 only serves to underscore this point.

Respectfully submitted,

TELEPORT COMMUNICATIONS GROUP INC.

A handwritten signature in cursive script, appearing to read "Teresa Marrero", is positioned above a horizontal line.

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Dated: April 17, 1997

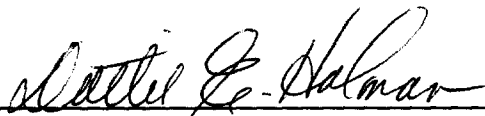
CERTIFICATE OF SERVICE

I, Dottie E. Holman, do hereby certify that a copy of the foregoing Comments was sent by hand-delivery this 17th day of April, 1997, to the following:

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